



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 13, 1993

Honorable Jim Mapel
Criminal District Attorney
Brazoria County Courthouse
Room 408A
Angleton, Texas 77515

Letter Opinion No. 93-30

Re: Whether a home-rule city may adopt a
nepotism rule that is more restrictive than
state law (RQ-359)

Dear Mr. Mapel:

You have asked us to consider whether the chief of police of the City of Freeport may hire as a police officer a son of a veteran city council member. We understand that the city council members have no approval power of the police chief's hiring decisions. Accordingly, such a hiring does not violate section 1(a) of the state nepotism statute, V.T.C.S. article 5996a, which applies only to persons with actual control over the selection of an employee. See Attorney General Opinion DM-163 (1992) at 1; Letter Advisory No. 156 (1978) at 1. See generally Attorney General Opinion JM-91 (1983).

The hiring would, however, violate section 11.04 of the City of Freeport's home-rule charter, which provides as follows:

No person related within the second degree of affinity or within the third degree by consanguinity to any elected officer of the City, or to the City Manager, shall be appointed to any office, position or clerkship or other service of the City.

You ask, therefore, whether section 11.04 of the home-rule charter unconstitutionally conflicts with section 1(a) of the state nepotism statute, article 5996a, V.T.C.S. We conclude that it does not.

Article 11, section 5 of the Texas Constitution authorizes a city with a population of at least 5,000 inhabitants to adopt or amend its city charter by a majority vote of the qualified voters of the city, although a city may not adopt or amend its charter so that the charter contravenes the state constitution or general laws that the legislature has enacted. In *City of Richardson v. Responsible Dog Owners of Texas* the Texas Supreme Court considered whether a city's comprehensive animal control ordinance unconstitutionally conflicted with section 42.12 of the Penal Code, which restricts the ownership of dogs that have engaged in vicious conduct. *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17, 17, 19 (Tex. 1990). The *City of Richardson* court stated that the mere fact that the legislature has enacted a law addressing a subject does not completely

remove the subject matter from regulation by a home-rule city. *Id.* at 19. Instead, a court must consider whether it reasonably can construe a general law and a city ordinance so as to effectuate both. *Id.* (quoting *City of Beaumont v. Fall*, 291 S.W. 202 (1927)). If so, the court will not hold the city ordinance void. *Id.* (quoting *City of Beaumont v. Fall*, 291 S.W. at 206). Because the court in *City of Richardson* determined that it reasonably could construe section 42.12 of the Penal Code and the city ordinance so as to effectuate both, it concluded that section 42.12 of the Penal Code does not preempt the City of Richardson's comprehensive animal control ordinance. *Id.*

In Attorney General Opinion MW-540 (1982), this office considered the validity of a nepotism policy that the Texas Employment Commission (the "TEC") had proposed which applied to persons in positions of lesser responsibility than the state nepotism law reached. Attorney General Opinion MW-540 at 2. That opinion stated that the TEC was authorized to adopt the proposed nepotism policy unless the policy would contravene a policy or law established either by the constitution or the legislature, or under their authority. *Id.* Based upon a belief that the legislature did not intend to occupy the field or prevent a state agency from adopting a consistent but more far-reaching nepotism policy, this office concluded that the proposed TEC policy would not contravene state law. *Id.*

Likewise, we do not believe that the legislature intended to prevent a home-rule city from enacting a nepotism policy stricter than the state nepotism statute, provided that the home-rule city's policy is consistent with the policy against favoritism underlying the state nepotism law. *See id.* In our opinion, section 11.04 of the City of Freeport's charter, which prevents any person with hiring authority from hiring a relative within the second degree of affinity or within the third degree by consanguinity to any elected officer of the city or to the city manager, is consistent with section 1(a) of article 5996a, V.T.C.S. We conclude, therefore, that section 11.04 of the City of Freeport's charter is valid.¹

You also ask, in the event we determine that section 11.04 of the City of Freeport's charter is consistent with section 1(a) of article 5996a, V.T.C.S., whether the exception in section 1(b) of article 5996a applies to the hiring of the council member's son. Section 1(b) applies only to a situation in which a person has been continuously employed by a governmental body for a certain period of time prior to the time the person's relative is elected or appointed to the governmental body. *See also* Attorney General Opinions DM-132 (1992) at 2; DM-2 (1991) at 2-3. Thus, section 1(b) does not apply to the situation about which you inquire.

¹The language of section 1(b) of the state nepotism law, V.T.C.S. article 5996a, supports our conclusion: section 1(b) precludes any municipal corporation from adopting a charter or ordinance that prevents the appointment of a person who meets the continuous employment requirements of that subsection. The legislature's express limitation on the power of municipal corporations in subsection (b) indicates that the legislature intentionally did not limit the power of municipal corporations in subsection (a).

As we have determined that section 11.04 of the City of Freeport's charter is consistent with section 1(a) of article 5996a, V.T.C.S., we need not answer your third question.

S U M M A R Y

A home-rule city may adopt a nepotism policy that is more restrictive than section 1(a) of the state nepotism law, V.T.C.S. article 5996a.

Yours very truly,

A handwritten signature in cursive script, reading "Kimberly K. Oltrogge".

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee